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ABSTRACT

This paper examines some of the historical and contemporary assumptions regarding the social and educational context of the use of corporal punishment on children, assumptions that are implicit in the Supreme Court's decision in the Ingraham v. Wright case. Beginning with a summary of the Florida case, the author outlines the Court's majority opinion concerning the constitutional issues (involving the Eighth and Fourteenth Amendments), and the dissenting minority's positions. The majority held that corporal punishment of school children neither constitutes "cruel and unusual punishment," nor requires due process beyond traditional common law remedies. The author argues that this decision reflects the majority's conservative cultural values, which stress the importance of historic tradition, specifically, of Puritan, authoritarian tradition. An analysis of parent-child, teacher-student relationships indicates the tension between democratic and authoritarian concepts in American society. (DS)

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Neither Corporal Punishment Cruel nor Due Process Due: The United States Supreme Court's Decision in Ingraham v. Wright

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Neither Corporal Punishment Cruel nor Due Process Due: The United States Supreme Court's Decision in Ingraham v. Wright

Between the idea
And the reality
Between the motion
And the act
Falls the Shadow.
T. S. Eliot, Journey of the Magi

In April of this year, the United States Supreme Court handed down its decision, in the case of Ingraham v. Wright,[1] that corporal punishment of students in the nation's public school system does not violate the Eighth and Fourteenth Amendments of the United States Constitution. If the Court had been disposed to reach just the opposite conclusion and to ban corporal punishment as an option that teachers and administrators can exercise in maintaining discipline in the public schools, the Court could likely have found no better case on which to base its judgment. The evidence heard by the Court in this case cannot help but shock the sensibilities of even the most clinical observer. In reaching its decision, the majority of the Court was quite obviously looking beyond the circumstances of this particular case, which developed in a junior high school in the school system of Dade County, Florida. What the Court had in mind was that the issue was not merely how corporal punishment was applied by the officials of one particular school system, but rather whether corporal punishment as a principle is inherently inconsistent with the tenets of constitutional law, and thus whether school officials throughout the nation

[1] 97 S. Ct. 1401 (1977).

have the authority to administer corporal punishment in any degree at all. On the basis of evidence pointing to its misuse in one particular case, the Court apparently was not willing to say no to the use of corporal punishment in general. Aware that its ruling in this case would set a precedent for the entire nation, the Court considered as evidence more than just the facts of this case. It looked at the cultural and historical setting as a background for viewing the position corporal punishment occupies in American education. Thus, the Court intended to base its decision governing the nationwide practice of corporal punishment in the schools, in part at least, on a balanced understanding of national attitudes and values pertaining to corporal punishment and on the historical wellsprings from which those values flow.

As we shall see, these current national attitudes and values, as well as their historical counterparts, reflect two diametrically opposed concepts of the nature of man. In this paper, I want to focus particularly on the development, in the American context, of these two quite different views of man, each of which reaches different conclusions as to the proper role of physical punishment in controlling behavior. This analysis will afford the necessary basis for understanding how the Court reached the decision it did. As a preliminary to such an analysis, it is, of course, necessary that we understand the facts of the particular case.

The case began in 1971 when James Ingraham and Roosevelt Andrews,[2] both enrolled in the Charles R. Drew Junior High School in Dade County, Florida, filed a three-count complaint in the United States District Court

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[2]Since both Ingraham and Andrews were minors, the suit was filed in the names of James' mother (Eloise Ingraham) and Roosevelt's father (Willie Everett).

for the Southern District of Florida. In the first two counts, Ingraham and Andrews requested damages for personal injuries resulting from paddling incidents that occurred in October 1970 at Drew. Count three was a class action seeking to stop the use of corporal punishment in the Dade County school system on behalf of all students[3] of that school system who were subject to the corporal punishment policies of the school board. Named as defendants in all three counts were Willie J. Wright, principal at Drew Junior High School; Lemmie Deliford, an assistant principal; Solomon Barnes, an assistant to the principal; and Edward L. Whigham, superintendent of the Dade County school system. The facts of the case are as follows.

On October 6, 1970, several students, including fourteen-year-old James Ingraham, were slow in leaving the stage of the school auditorium at Drew when asked to do so by a teacher, so a number of them were taken to principal Wright's office to be paddled. Ingraham, claiming he had left the stage when requested to do so, refused to allow Wright to paddle him. Unmoved by Ingraham's protest of innocence, Wright called for the help of Lemmie Deliford, his assistant principal, and Solomon Barnes, his administrative assistant. With Barnes holding Ingraham's legs and Deliford his arms, Wright spanked him on the buttocks more than twenty times with a two-foot long wooden paddle. Wright then told the hurt and crying Ingraham to wait outside his office or he would "bust him on the side of [his] head."[4]

Ingraham went home anyway. His mother, after examining his black

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[3]Except a girl who specifically requested she be excepted from the class action.

[4]Transcripts at 294.

and purple backside, took him to a local hospital where the examining physician diagnosed the injury as a hematoma. The doctor prescribed pain pills, a laxative, sleeping pills, and ice packs and advised Ingraham to stay home for at least a week.[5] Ingraham was out of school for eleven days, and he claimed he could not sit comfortably for about three weeks.[6]

Roosevelt Andrews, the co-plaintiff in the case, was at Drew for one year, during which time he was paddled about ten times for being late to classes, making noise, fooling around, and not "dressing out"[7] for gym class. On one occasion, Andrew's gym teacher paddled him for not having tennis shoes for class. When Andrews tried to explain that his tennis shoes were stolen and he had no money to buy new ones, his teacher told him that was no excuse and paddled him anyway. On another occasion, a teacher stopped Andrews in the hall and told him that because he could not possibly avoid being late to his next class he would have to take him to see Mr. Barnes. Barnes sent Andrews to a bathroom where he was lined up against the urinal with about fifteen other boys and then Barnes paddled them all--some so hard that, according to Andrews, they were "hollering, cry, prayed, and everything else [sic]."[8] Andrews remained behind after the other boys left and tried to explain to Barnes that he would have made it to class if the teacher had not stopped him. Barnes, unconvinced by Andrew's claim of innocence, told him to bend over. When Andrews refused,

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[5]Transcripts at 148.

[6]Transcripts at 149.

[7]"Dressing out" refers to putting on the proper clothes--usually a shirt, shorts, underwear, socks, and tennis shoes--for gym class.

[8]Transcripts at 294.

Barnes pushed him against the urinal and began hitting him with his paddle:

> He first hit me on the backsides and then I stand up and he pushed me against the bathroom wall, them things--that part of the bathroom, the wall . . . [b]etween the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back there.[9]

Other students also testified to frequent and often severe paddlings at Drew, many under a unique system of punishment for those accused of misbehaving in the auditorium. Each student sat in an assigned numbered seat. If a student got out of line, his or her number was written on a blackboard by a teacher. Later Barnes would walk into the auditorium and paddle the students whose numbers were listed--no questions asked. The following testimony, in the words of Rodney Williams (another student at Drew), illustrates the harshness and arbitrariness of the corporal punishment administered under the auditorium number system:

> So he [the teacher] put my number on the board. So when Mr. Barnes came, he asked for me and took me to the office and told me to hook up.
>
> Q What did he mean by "hook up"?
>
> A Grab a chair, you know. The chair, he means by hooking up on the chair.
>
> Q In preparation to being paddled?
>
> A So I refuse. I told him, I say, "Mr. Barnes, I didn't do nothing; that's why I refuse not to take a whipping."
>
> Q What did he do?
>
> A So he told me, say, "You are going to take this one." I said, "Mr. Barnes, I didn't do nothing. I'm not taking no whipping." So I was leaning over the table and I said, "I'm not taking a whipping," and I was hit across the head with the board. He was hitting me across the head with the board, and my back and everything.

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[9] Transcripts at 295.

Q He was whipping you where?

A Across the head, with the board, he was hitting me all across the head and on the back. I was begging him for mercy to stop and he wouldn't listen.
So he had some chairs in there and I was falling in the chairs as he was hitting me with the board.
Then after a while he took off his belt and then started to hit me with the belt and hit me with the buckle part, and tears was coming out of me.[10]

A few days later Williams was operated on to remove a lump of some sort on his head that had developed after the whipping incident. When Williams returned to school after about a week's absence, he had a half-inch scar on the side of his forehead and later complained of loss of memory.[11]

During the week-long trial, thirteen other students[12] testified to frequent and often severe paddlings--some receiving as many as fifty licks without stopping--for infractions ranging from "playing hooky" to chewing gum, whistling, or not keeping one's shirttails tucked in.[13] Before the principal defendants--Wright, Deliford, and Barnes--could testify, the court granted a defense motion for dismissal, stating that

> [c]onsidering the system as a whole, there is no showing of severe punishment degrading to human dignity, nor of the arbitrary infliction of severe punishment, nor of the unacceptability to contemporary society of corporal punishment in the schools, nor of excessive or disproportionately severe punishment.[14]

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[10]Transcripts at 594-95.

[11]Transcripts at 596-97.

[12]Several parents and relatives of students, a number of school teachers and administrators, and an assistant professor of educational psychology also testified.

[13]For those wanting additional evidence of the extent and severity of the use of corporal punishment at Drew, see Ingraham v. Wright, 498 F.2d 248, 257-59 (1974).

[14]Joint Appendix submitted to the Supreme Court at 155.

Ingraham and Andrews appealed.

On July 29, 1974, a three-judge panel of the Fifth Circuit Court of Appeals, concluding that "the system of punishment at Drew not only violated the constitutional prohibition against cruel and unusual punishment, but also violated due process,"[15] reversed the dismissal ruling of the district court and ordered the case returned for further proceedings.

But upon rehearing, the en banc court of appeals rejected the earlier conclusions of the three-judge panel and affirmed the judgment of the district court.[16] After finding the cruel and unusual punishment clause to be inapplicable to corporal punishment in public schools, the full court made it clear that "[w]e do not mean to imply by our holding that we condone child abuse, either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child.[17]

Furthermore, the court went on to say that if Ingraham's testimony as to the severity of the punishment he received at Drew was true, "a Florida state court could find the defendants civilly and criminally liable."[18] But, emphasizing that the proper action involved "tort and criminal law, not federal constitutional law,"[19] the court said, "We find it neither proper nor necessary to expand the Eighth Amendment beyond its

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[15] Ingraham, supra note 13 at 265.

[16] Ingraham v. Wright, 525 F.2d 909 (1976).

[17] Id. at 915.

[18] Id.

[19] Id.

intended and reasonable scope to encompass an action which is essentially based on the commission of a battery."[20]

Eschewing the imposition of procedural standards that would involve "further interference by federal courts into the internal affairs of public schools,"[21] the full court also held that there was no procedural due process violation of the Fourteenth Amendment, nor was there any substantive violation, noting that "[p]addling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children."[22]

Granting certiorari on the two questions of cruel and unusual punishment and procedural due process, the United States Supreme Court heard oral arguments in early November 1976. Six months later, on April 19, 1977, the Court, in a 5-4 decision, affirmed the judgment of the Fifth Circuit Court of Appeals that the cruel and unusual punishment clause of the Eighth Amendment of the Constitution does not apply to corporal punishment in the public schools, nor does the due process clause of the Fourteenth Amendment require that students subject to corporal punishment be given notice of charges against them and an opportunity to be heard.[23]

The majority opinion, written by Justice Lewis F. Powell, Jr. and citing historical and contemporary documentation supporting the use of

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[20] Id.

[21] Id. at 919.

[22] Id. at 917.

[23] Ingraham v. Wright, 97 S. Ct. 1401 (1977).

reasonable corporal punishment in the public schools, began by finding that "a single principle has governed the use of corporal punishment since before the American Revolution: teachers may impose reasonable but not excessive force to discipline a child."[24] And furthermore, while public and professional opinion may be sharply divided over the use of corporal punishment in the schools, "we can discern no trend toward its elimination."[25]

Having established both historical and contemporary support for corporal punishment in schools, the majority turned to the constitutional question of whether the cruel and unusual clause of the Eighth Amendment would not require its abandonment as a traditional form of discipline in the schools. They concluded that it would not: "An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."[26]

Furthermore, the majority could find no basis "for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools."[27] Besides, argued the majority, "[t]he openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner."[28] Thus the majority opinion held "that the Eighth Amendment does not apply to the paddling of

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[24] Id. at 1407.

[25] Id.

[26] Id. at 1409.

[27] Id. at 1411.

[28] Id. at 1412.

children as a means of maintaining discipline in public schools."[29]

Turning next to what the majority called "[t]he pertinent constitutional question [of] whether the imposition [of corporal punishment] is consonant with the requirements of due process," they concluded it is,[30] but held that "the traditional common law remedies are fully adequate to afford due process."[31] Interestingly enough, though, the majority acknowledged that "[w]ere it not for the common law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for equiring advance procedural safeguards would be strong indeed."[32] But the Court feared that the time and resources required to provide such constitutional safeguards, common law protection not withstanding, might well force teachers and administrators to abandon its use, thus substantially impairing the teacher's ability to maintain discipline in the classroom. For this reason the majority argued that even though requiring procedural due process might reduce the risk that students would be paddled unjustly, "[i]n view of the low incidence of abuse, the openness of our schools, and the common law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal."[33]

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[29] Id. at 1409.

[30] "[W]e find that corporal punishment in public school implicates a constitutionally protected liberty interest." Id. at 1413.

[31] Id.

[32] Id. at 1414.

[33] Id. at 1418.

The dissenting opinion, written by Justice Byron R. White, disagreed strongly with the majority. Calling the majority's distinction between criminal and noncriminal punishment for purpose of the Eighth Amendment "plainly wrong," Justice White stated that "[w]here corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools."[34]

By holding that the Eighth Amendment protects only criminals, the majority creates the anomalous situation, says White, of "a prisoner . . . beaten mercilessly for a breach of discipline, . . . entitled to the protection of the Eighth Amendment, while a school child who commits the same breach of discipline and is similarly beaten is simply not covered."[35] White also rejected the majority's schools-as-open-institutions argument: "[I]f a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity."[36] "Nor is it an adequate answer," said White, "that school children may have other state and constitutional remedies available to them."[37]

Also disagreeing with the majority's holding that the due process clause of the Fourteenth Amendment does not apply to the imposition of corporal punishment in the public schools, Justice White argued for the

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[34] Id. at 1420.

[35] Id. at 1421.

[36] Id. at 1422.

[37] Id.

same due process protection for corporal punishment that the Court required for short-term suspension in Goss.[38] Viewed in the context of Goss, the procedural requirement White would impose before administering corporal punishment would normally be "if anything, less than a fair-minded principal would impose upon himself."[39]

The majority opinion contains numerous references to the traditional conservative values of many white, middle-class Americans, particularly those living in the South and the Midwest. This comes as no great surprise, given the Court's present conservative disposition. Since the judicial process is an important aspect of our cultural milieu, which both influences and is influenced by contemporary social, political, and economic conditions and by public opinion, it is hardly surprising that the rebirth of conservative values in American society as a whole is reflected in the constitutional interpretation the Court adopts in any specific case.

The very emphasis the majority opinion places on the importance of understanding history and tradition in Ingraham itself reflects white, middle-class, conservative values, which stress the importance of heritage. At least two dozen times the Court invokes "history" and "tradition" in its arguments. In determining that the Eighth Amendment does not apply to corporal punishment of schoolchildren, the Court's majority draws on "the way in which our traditions and our laws have responded to the use of

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[38]The Court said that a student facing suspension from school of no more than ten days, must be given "notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Goss v. Lopez, 419 U.S. 565, 581 (1976).

[39]Id. at 583.

corporal punishment in public schools."[40] The majority cursorily outlines the historic precedents for the practice, citing the Colonial period as its source in America. The majority's reasoning here is clear: because corporal punishment in the schools has historic precedents both in social practice and in common law, which of course reflects social practice, that heritage cannot be tampered with, especially since corporal punishment is still in use today. A similar line of reasoning is evident in the majority's assertion that the Eighth Amendment applies only to criminals. The majority found "an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools."[41]

The Court's affinity for conservative values is also to be seen in the acceptance of the following tenets implied in the majority opinion:

. The historically close relationship of the school to the community, emphasizing local control and the influence of local norms on the learning environment behind the schoolhouse door ("The openness of the public school and its supervision by the community afford significant safeguards. . . ."[42]

. Respect for established institutions of government ("[R]espect for democratic institutions will . . .

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[40] Ingraham, supra note 37 at 1406.

[41] Id. at 1411.

[42] Id. at 1412.

dissipate if they [teachers] are thought too ineffectual to provide their students an environment of order.")[43]

. Respect for traditional authority figures ("Teachers, properly concerned with maintaining authority in the classroom. . . .")[44]

. The minimal intrusion of the federal government into areas of traditional state and local concern ("Elimination or curtailment of corporal punishment [should be the result of] the normal process of community debate and legislative action. . . .")[45]

To elaborate further on these commonly understood values of American conservatism is, for me at least, to belabor the obvious. What is perhaps less obvious and by far a more intellectually provocative line of inquiry is to examine the historical and contemporary assumptions regarding the social and educational context of the use of corporal punishment on children. As we shall see, these assumptions relate closely to the Calvinist concept of the nature of man, a concept deeply rooted in America's Puritan heritage. The Court's implicit sanction of these assumptions, without provision for even minimal due process in the public schools, is of course the essence of Ingraham.

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[43] Id. at 1418.

[44] Id. at 1417.

[45] Id. at 1417-18.

In America, the historical roots of the use of corporal punishment can be traced to the Puritan settlement of the Massachusetts Bay Colony in the seventeenth century, although other American colonies imported penal practices in wide use at that time, including severe corporal punishment of criminals. But the conjunction between the Calvinist philosophy of innate depravity and the practice of physical punishment intended to curtail man's evil nature achieved its most obvious expression in the Bay Colony. The punishment of children was but one manifestation of the Puritan view that man was basically weak, sin-ridden, and incapable of truly moral, independent action. According to Jonathan Edwards, man was but "a spider or some loathsome insect," which God abhorred and, at the slightest provocation, would "cast into the fire" of hell.[46] Man viewed in such odious terms could find redemption only through strict obedience to the doctrine of the Puritan religion.

The authority of the Puritan governors, who strove to control the secular as well as the religious affairs of their flock, was believed to emanate from and reflect God's ultimate authority. This belief, coupled with the conviction that man was in need of strong direction to keep him from indulging his depraved nature, led to the development of a theocratic government, which employed tight, autocratic control. Thus, church and state conjoined to enforce the value of obedience to authority--both of God and of his ministers. Cotton Mather both articulates the need to regulate profligate tendencies among Puritan adherents and indicates the high value placed on reverence for authority:

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[46] M. Tyler, A HISTORY OF AMERICAN LITERATURE, 1710-1765, VOL. II 191 (1890).

> There is a liberty of corrupt nature, which is affected both by men and beasts, to do what they list; and this liberty is inconsistent with authority, impatient of all restraints; by this liberty, sumus omnes Deteriores; 'tis the grand enemy of truth and peace, and all the ordinances of God are bent against it.[47]

Puritan belief in the sanctity of authority and the virtue of obedience was amply evident in their attitude toward children, who were hardly held in high esteem. The progeny of this innately depraved creature called man was also, quite naturally, possessed of the same loathsome characteristics. Thus, children were regarded as "young vipers and infinitely more hateful than vipers,"[48] who must have the devil beaten out of them.[49] The theocracy's legal sanctions against a child not responding to correction imposed on him by his parents were severe indeed:

> If a man have a stubborn or rebellious son, of sufficient years and understanding, viz, 16, who will not obey the voice of his father or the voice of his mother, and that when they have chastened him will not harken unto them, then shall his father and mother, being his natural parents, lay hold on him, and bring him to the magistrate assembled in Court, and testify unto them, by sufficient evidence, that this their son is stubborn and rebellious, and will not obey their voice and chastisement, but lives in sundry notorious crimes, such a son shall be put to death. (Emphasis added.)[50]

While there is no evidence that the law was ever applied, still it is little wonder, in light of this colony-mandated punishment for extreme cases of youthful disobedience of the Fifth Commandment, that all but the most brutal parental application of corporal punishment to children was

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[47] MAGNALIA CHRISTI AMERICANA: OR, THE ECCLESIASTICAL HISTORY OF NEW-ENGLAND, ETC. 127 (1855).

[48] Jonathan Edwards, quoted in P. Ford, THE NEW-ENGLAND PRIMER 1 (1879).

[49] RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND, VOL. II 9 (June 14, 1642).

[50] RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, VOL. II 179-80 (November 4, 1646).

regarded as reasonable by our Puritan forefathers. The same obedience demanded of children was likewise expected of servants. The early laws and ordinances provided that "[m]agistrates may punish disorderly children or servants on complaint, by whipping or otherwise, as they see cause. . . ."[51]

The whipping of children must have seemed in most cases mild indeed in comparison to the widespread corporal punishment inflicted on criminals, including such methods of punishment as the pillory, the whipping post, and the stocks, all of which were considered quite "reasonable." Any Puritan parent having second thoughts about the rightness of rod-enforced discipline of his or her child could turn for reassurance to the Bible: "Foolishness is bound up in the heart of a child, but the rod of correction shall drive it far from him."[52]

The Puritan belief that man's innate depravity must be rigidly controlled through strict adherence to the rule of God among men encouraged the development of an educational system intended to perpetuate Puritan doctrine and values. In the "Old Deluder Satan Act," the governors established a system of public instruction intended to provide "knowledge of the scripture," and to ensure "that learning may not be buried in the graves of our forefathers."[53] Furthermore, according to John Calvin, whose theology formed a basis for Puritan beliefs, "Children are inherently

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[51] RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND, VOL. II 9 (June 14, 1642).

[52] Proverbs 22:15.

[53] Quoted in E. Cubberley, READINGS IN PUBLIC EDUCATION IN THE UNITED STATES 18 (1934).

evil and must be trained rigorously in developing good habits. Education is to be a complete regimentation of the child to suppress his evil nature and build good living and thinking."[54] The instrument for the realization of Calvin's proposition concerning the goal and method of education was the rod. Rules drawn up for the Free Town School of Dorchester in 1645 established the rationale and procedure for the logical extension of rod-enforced training of children in the home by parents to that same but more formalized purpose in the school by the master in loco parentis:

> And because the Rodd of Correction is an ordinance of God necessary sometymes to bee dispenced unto Children . . . , [i]t is therefore ordered and agreed that the schoolemaster for the tyme beeing shall haue full power to minister correction to all or any of his schollers without respect of p'sons according as the nature and qualitie of the offence shall require whereto, all his schollers must bee duley subject and no parent or other of the Inhabitants shall hinder or goe about to hinder the master therein.[55]

While this paper focuses on the Puritan roots of the use of corporal punishment in the public schools, it would be entirely misleading to suggest that all the early colonists ascribed to the same point of view. Quite the contrary. Although corporal punishment was used in Quaker schools, it was not assigned the importance that it received in Puritan schools, probably because the Quakers were not so inclined to view children as essentially depraved and therefore did not see as much need to govern them by fear--of God and of authority. The school overseers recommended (in 1796)

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[54] W. Walker, JOHN CALVIN 211 (1906).

[55] Dorchester Town Records (January 14, 1645), quoted in FOURTH REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, VOL. IV 56 (1883). These 1645 rules prohibiting parental interference with the school master's power to inflict corporal punishment were sustained 331 years later in the Supreme Court's summary judgment in Baker v. Owen, affirming the court of appeal's ruling that parents have no constitutional right to control the means of discipline their children receive while enrolled in the public schools. 423 U.S. 907, aff'g 395 F. Supp. 294 (M.D.N.C. 1975).

that "the children under your care be governed, as much as possible [by love]. This will make the use of the Rod in a good degree unnecessary, and will induce the Children to love and respect rather than to fear."[56]

The Quaker overseers promulgated a set of rules bearing on student behavior, which they printed, distributed to the schools, and read publicly "at least every three months, and as much oftener as fit occasion may present, and a printed copy thereof put up in a conspicuous place in each of the schools."[57] The rules contained no mention of consequences, should one of them be violated, though obviously some disciplinary measure would be taken. Positive reinforcement was also employed "[a]s an incentive for scholarship, it was customary to give 'premiums' or awards." Even though philosophically the Quakers objected to such a course, "the policy of rewards was approved by the overseers, and ways and means to accumulate funds for these purposes were sought."

Games and hazing were common, as were practical jokes, sometimes even played on schoolmasters. Student newspapers and magazines were also quite common, and apparently they were not subjected to strict censorship. It is apparent that Quaker school life and attitudes toward children and their discipline were often in sharp contrast to what was occurring in Massachusetts at approximately the same time.[58] The freedom of expression

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[56] J. Straub, Quaker School Life in Philadelphia Before 1800, 89 THE PENN. MAG. OF HIST. & BIOGRAPHY 451 (October 1965).

[57] OVERSEERS MINUTES, VOL. III 68 (February 11, 1796).

[58] One cannot resist pointing out the small irony (already apparent to some) of having an American President (Nixon), whose religious upbringing was in the Quaker faith, appoint four Justices to the Court during his term of office, all of whom supported the majority view in Ingraham.

given students and the publication of laws (as opposed to authoritarian caprice) might be taken to suggest the roots of democratic/humanistic influence in public schools in this country. While the principles of Jeffersonian democracy were obviously a more powerful and lasting force in American education than were the ideals and practices of the Quakers, it is noteworthy that two contrasting (and frequently conflicting) religious and educational philosophies were established in America about the same time.

The democratic/humanistic view of man has had an obvious influence on the public school disciplinary practices deriving from the Puritan view that mankind and his progeny are essentially depraved and therefore to be governed by fear of God and civil authority. One needs only to read some of the voluminous writing on the history of childhood and of the use of corporal punishment in the schools to see how the democratic/humanistic influence has resulted in the gradual waning (particularly during the past several decades) of the use of corporal punishment in American schools and in the increasing rejection of the implicit assumption (that children are not reasonable and, therefore, must be governed by fear) on which its use is based.[59]

Still, the practice persists. The Court is indeed correct in asserting that the use of corporal punishment in the schools "survived the transformation of primary and secondary education from the colonials'

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[59] See H. Falk, CORPORAL PUNISHMENT (1941); N. Edwards & H. Richey, THE SCHOOL IN THE AMERICAN SOCIAL ORDER (1947); K. James, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS (1963); Reitman, Follman & Ladd, CORPORAL PUNISHMENT IN PUBLIC SCHOOLS (ACLU Report 1972); Cubberley, PUBLIC EDUCATION IN THE UNITED STATES (1934 ed.).

reliance on optional arrangements to our present system of compulsory education and dependence on public schools, . . . [and] continues to play a role in the public education of schoolchildren in most parts of the country."[60] And so it does, with the exception of three states: New Jersey (which outlawed its use in the schools in 1867), Maryland, and, ironically, Massachusetts.[61] Several cities, including Chicago, Baltimore, New York, Philadelphia, and the District of Columbia have also forbidden its use. The survival of corporal punishment in American public schools is all the more noteworthy, considering that many other countries around the world have abandoned its use.[62]

Perhaps corporal punishment in American schools remains an important vestige of our Puritan heritage because its use is sustained by the beliefs of a considerable number of Americans (particularly in the South and Midwest) who hold fundamentalist religious convictions and of still others who consider that man is innately aggressive and therefore, according to this argument, bad. It is this latter notion, buttressed by considerable scientific and pseudoscientific evidence, that holds a particular fascination to many Americans. Popularized in the sixties by a number of books (Robert Ardrey's The Territorial Imperative, Desmond Morris's The Naked

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[60]Ingraham v. Wright, 97 S. Ct. 1401, 1407 (1977).

[61]Twenty-one other states have enacted legislation providing for the moderate use of corporal punishment in public schools. Id. at 1408.

[62]Among them are Poland, Luxembourg, Holland, Austria, France, Finland, Sweden, Denmark, Belgium, Cyprus, Japan, Ecuador, Iceland, Italy, Jordan, Qatar, Mauritius, Norway, Israel, The Philippines, Portugal, and all Communist Bloc countries. Brief of the American Psychological Association Task Force on the Rights of Children and Youth as Amicus Curiae in Support of Petitioners [James Ingraham and Roosevelt Andrews], filed July 22, 1976 in the Supreme Court of the United States, at 3.

Ape, and Konrad Lorenz's On Aggression were three of the best-selling books of this genre), the thesis that man and animals share certain common innate behavior patterns, such as territoriality, aggression, and dominance, strikes a particularly responsive chord in many Americans.

"Human sympathies, moral convictions, political absolutes, philosophical certainties--none, whatever the discomfort their frustration may cause us, will suborn or suppress the territorial imperative, that biological morality which will still contain the behavior of beings when Homo sapiens is an evolutionary memory."[63] Those dramatic words, by dramatist cum ethologist[64] Robert Ardrey, are from one of the most popular books of this genre, The Territorial Imperative. Ardrey's message to the world is that man is innately territorial and aggressive, a behavior pattern he shares with his animal ancestors. "We act as we do for reasons of our evolutionary past," says Ardrey, "not our cultural present, and our behavior is as much a mark of our species as is the shape of a human thigh bone or the configuration of nerves in a corner of the human brain."[65] Man's biogenetically derived aggressiveness is constantly at odds with his culturally derived capacity "for tenderness, sympathy, charity, [and] love."[66]

Adopting Herbert Spencer's phrases "code of amity" and "code of enmity" to describe this dual nature of man, Ardrey asserts that man

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[63] R. Ardrey, THE TERRITORIAL IMPERATIVE 294 (1966).

[64] Ethology is the study of innate behavior patterns in animals "pioneered by Austria's Konrad Lorenz and Holland's Niko Tinbergen in the 1930's." Id. at 20.

[65] Id. at 4-5.

[66] Id. at 262.

must follow them "unthinkingly, since he has no alternative. Let enough members of society disobey the code of amity, and the society will fragment; let enough disobey the code of enmity and society will be crushed."[67]

It is quite predictable that Ardrey would find Spencer, the original social Darwinist, an appealing source. Darwin's theories offered determinism a scientific justification, which social theorists like Spencer hastened to apply to human social interaction. Thus, on two levels (the biological and the social), man was seen as subject to the same natural forces as those determining the course of the rest of nature. Man's lot, like that of the other beasts, was cast irrevocably, not by God as the Calvinist Puritans had believed, but by natural scientific law. But what Puritan theology and social Darwinism (as well as Ardrey's neo-naturalism) have in common is determinism. Man is governed by forces beyond his control, whether those forces are seen as deific (as the Puritans believed) or naturalistic and genetic (as Ardrey believes).

Obviously, if man must follow his innately aggressive (and therefore, destructive) course "unthinkingly," he can hardly be conceived to possess the free will and independence of action central to the democratic/humanistic conception of man. In Ardrey's scheme, man is as weak and helpless as Jonathan Edwards' "spider" dangled over the fires of hell. As M. F. Ashley Montagu has said of the works of Ardrey, Morris, and Lorenz, they represent "the new litany of 'innate depravity'" and a contemporary version of "original sin."[68]

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[67] Id. at 263.

[68] Montagu presents his argument in an article in MAN AND AGGRESSION (A. Montagu ed. 1968) along with the contributions of several experts who share Montagu's desire "to put the record straight, to correct what threatens to become an epidemic error concerning the causes of man's aggression, and to redirect attention to a consideration of the real causes of such behavior." Id. at ix.

Although Ardrey does not himself acknowledge his Calvinist propensities, he is certainly aware that his philosophic roots differ from Montagu's. According to Ardrey, Montagu represents a new "scientific romanticism" much akin to Rousseau's philosophy (man is innately good), but restated in scientific terms. Thus Ardrey accuses Montagu of cloaking "the original goodness" in a "scientific vocabulary." The irony of his rejection of Montagu's position is that Ardrey follows exactly the same process to express his philosophical biases in favor of determinism and innate depravity.

Desmond Morris's The Naked Ape emphasizes the links between man and his fellow primates. Morris, a zoologist, draws on material from paleontology and ethology, including "direct observation of the most basic and widely shared behavior patterns . . . of the naked ape itself."[69] One of these "widely shared behavior patterns" is the sexually related "appeasement gesture" in the fighting behavior of primates. In man, this gesture has been culturally adapted to become the spanking ritual:

> [T]he more specific case of the adoption of the female sexual rump-presentation as an appeasement gesture has virtually vanished, along with the disappearance of the original sexual posture itself. It is largely confined now to a form of schoolboy punishment, with rhythmic whipping replacing the rhythmic pelvic thrusts of the dominant male. It is doubtful whether school-masters would persist in this practice if they fully appreciated the fact that, in reality, they were performing an ancient primate form of ritual copulation with their pupils.[70]

If Morris is correct, then it is indeed ironic that corporal punishment, intended to instill in children a respect for authority and other

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[69] D. Morris, THE NAKED APE 11 (1967).

[70] Id. at 137.

values we associate with civilized behavior, is at base a most primitive (and certainly uncivilized) ritual. Morris's implicit message is that, try as we might, we are still no different (and no better) than the so-called "lower primates." Far from being "in action how like an angel, in apprehension how like a god!"[71] man is in nature no different from the creatures ("beasts") he has for so long scorned. Morris's argument, like the Calvinist argument of innate depravity, is hardly calculated to bolster man's self-esteem.

Morris grants, however, that we do indeed differ from our hairy cousins in our cultural development and aspiration toward ideals. But he cautions that "in acquiring lofty new motives, [man] has lost none of the earthy old ones."[72] What man needs, Morris argues, is a reconciliation between these two sides in order to become a "less worried and more fulfilled animal."[73] But notice that even with resolution of the duality, man will still be an "animal." There is no transcendence here.

Konrad Lorenz comments on man's dual cultural/biogenetic nature in terms similar to those of Morris. In On Aggression, Lorenz posits (like Ardrey) that man is innately aggressive; at the same time, though, man can apprehend and pursue "the very highest moral and ethical values":

> [T]he Janus head of man: The only being capable of dedicating himself to the very highest moral and ethical values requires for this purpose a phylogenetically adapted mechanism of behavior whose animal properties bring with them the danger that he will kill his brother, convinced that he is doing so in the interests of these very same high values.[74]

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[71] Shakespeare, Hamlet II.ii.317.

[72] Morris, supra note 69 at 9.

[73] Id.

[74] K. Lorenz, ON AGGRESSION 265 (1966).

But Lorenz sees rapid social and technological change causing the maladaptation of social norms and rites derived from this so-called "phylogenetically adapted mechanism of behavior" as one of the major factors "threatening to interrupt the continuity of our Western culture."[75]

While many may disagree with the basic arguments of Ardrey, Morris, Lorenz, and others that man is an innately aggressive creature subject to biological forces beyond his control,[76] their view of man has achieved considerable acceptance by American lay readers. Why? One plausible explanation is provided by Montagu:

> The layman is bewildered. Two World Wars, the breakdown in political, public, and private morality, the ever-increasing crime rates, the development of a climate and a culture of violence, together with the consciousness of an apocalyptic realization of irreversible disaster, are quandaries enough to cause men to look desperately about them for some sort of an answer, for some explanation of the meaning, of the causes which seem to be leading man to destruction.[77]

Perhaps Montagu is right; perhaps not. Whatever the explanation, the Puritan concept of man as an innately depraved creature whose fate is preordained appears to have been transformed by the scientific revolution into the concept of man as an innately aggressive creature whose fate is

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[75]The other factors mentioned by Lorenz are "[d]iminishing cohesion of the family group and decreasing personal contact between teacher and pupil. . . ." Id. at 254.

[76]There is an extraordinary amount of research, both theoretical and empirical, on the causes of man's aggressive behavior, the distinguishing feature of which is its absence of consideration of innate aggression. The anthropologically derived theories of cultural stress are one example. A representative work in this field is R. Naroll, DATA QUALITY CONTROL: A NEW RESEARCH TECHNIQUE; PROLEGOMENA TO A CROSS-CULTURAL STUDY OF CULTURE STRESS (1962). Another example comes from psychological theories of political violence. For an excellent synthesis of the empirical research and partial theories in this field, see T. R. Gurr, WHY MEN REBEL (1970).

[77]Lorenz, supra note 74 at viii.

genetically determined. These notions seem to be well entrenched in the subconscious of many Americans, finding cultural expression in times of social change and unrest.

Another modern reappearance of the Puritan belief in man's innate depravity, particularly the idea of the child as evil, is to be found in a number of recent American films. "The Exorcist," "Rosemary's Baby," "The Omen," and "The Devil within Her" are but a few of the more popular recent motion pictures that have treated the devil-in-child or devil-as-child theme. The hugely successful film "The Exorcist" depicts an innocent twelve-year-old girl whose body is suddenly and inexplicably invaded by the Evil One. Defying the best efforts of science and medicine, the Devil remains in control of the child until driven out by the exorcist rites of a Catholic priest. "Rosemary's Baby" is a film about a married woman who bears a child fathered by Satan. Conventional medicine, bewildered by the strange aspects of her demonic pregnancy, is powerless to help her. A child born of Satan is also the subject of both "The Omen" and "The Devil within Her."

The seemingly endless film variations on the child-as-demon theme expressed in these films moved one movie critic to remark that "[t]he babies in them are easy customers for cinema's feeble conception of badness, which is as puny an approximation of evil as Pollyanna is of virtue."[78] Puny or not, there seems to be something emotionally and aesthetically compelling about supreme evil invading (or being embodied

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[78]P. Gilliatt, Vivat Satans!, THE NEW YORKER 81 (July 19, 1976).

in) supreme good. The most handy archetype here is the snake (evil, knowledge, experience) in the garden (good, blissful ignorance, innocence).

The same juxtaposition of extremes occurs in the image of the child-demon. When rendered in fictional terms as in the motion pictures mentioned, this dichotomous image--of the child as demon or devil/the child as innocent, or the child as actively evil/the child as passively good, or the child as the source of evil/the child as the victim of evil--serves as a focal point for adult anxieties, with fear of rebellion by children being one of the primary ones.

Two themes stand out in these movies: the straight-line reincarnation of the child-as-evil belief of the Puritans and the inability of modern science to control evil forces. This latter notion has prompted one critic to observe in his review of "Rosemary's Baby" that "[t]he film, like the culture, is part of the challenge to science, for if God-concepts are ship-wrecked on the problem of evil, neither does science provide us with answers."[79]

In terms very much like Ashley Montagu's explanation of the contemporary popularity of the biogenetic, deterministic concept of "innate aggression," Forshey explains the immense popularity of the child-as-devil, antiscience films as a derivative of

> [t]he events of our day, the seemingly uncontrollable forces existing in the world, [which] have opened up the occult again. We are coming to believe in powers and principalities again and are trying to find the language to express that belief. . Wars, the increasing number of violent crimes against persons, the devastating undermining of our political institutions, the energy and environmental crises, etc.--all these seem to

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[79] G. Forshey, A Vision of Evil, 91 THE CHRISTIAN CENTURY 183 (Feb. 13, 1974).

> be out of the hands of human beings. It seems as if the devil himself has control of the forces which shape us. . . .[80]

The widespread attention paid in the news media to juvenile crime indicates both the adult anxieties about uncontrolled or evil children and the seeming insufficiency of social science to cope with such children. The author of Time magazine's cover article "The Youth Crime Plague" (July 11, 1977) suggests the insecurities that adults experience when confronted with the seemingly purposeless violence and mayhem wreaked by child criminals:

> How can such sadistic acts--expressions of what moral philosophers would call sheer evil--be explained satisfactorily by poverty and deprivation? What is it in our society that produces such mindless rage? . . . Or has the whole connection between crime and society been exaggerated? Some of the usual explanations seem pretty limp.[81]

If traditional social scientific explanations of youthful deviance fail to adequately explain such behavior, and if social science has no workable solutions to youth crime, then it makes a kind of emotional sense to attribute such inexplicable violence to supernatural, or at least mysterious, forces. "Sheer evil" in youthful criminals is perhaps ultimately comprehensible to many Americans only in the superstitious or occult context of celluloid child-devils.

Like the relationship between man and society, the relationships between parent and child, and between teacher and student are seemingly beyond our control. In contemporary American society, the "youth rebellion" of the 1960s aroused extreme anxiety among parents, teachers,

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[80] Id.

[81] TIME, July 11, 1977, at 25.

and other representatives of established authority. Likewise, the "repression" of youth by adult authority brought about extreme anxiety among the young. As long as we look only at the surface issues and occurrences of this period, the anxieties of both sides seem widely out of proportion and inappropriate. But if we view the social disruption of this decade in historic and cultural context, we can perhaps glimpse the underlying primitive currents of the tension between teacher and student--between parent and child.

The basis for the parent-child relationship is biological, and, as F. S. C. Northrop notes,[82] this biological relationship finds expression in "law of status." Northrop maintains that such law-of-status relationships are the basis for the most primitive kind of government predicated on inheritance and the rule of primogeniture. Power relationships based on law of status are of necessity, according to Northrop, authoritarian and vertical. In the parent-child relationship and (since the teacher traditionally stands in loco parentis) the teacher-student relationship, the adult's authority over his or her children emanates from his biologically determined status, not from his fitness to govern according to democratic, contractual criteria.

Such absolute power as that of a parent over a child, based not on merit but on biology, has provoked various cultural anxieties, which find expression in our mythology and art. It can be argued that the absolute, biologically determined relationship of parent to child is both the source and the expression of such collective cultural anxieties as fear of repression

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[82] F. Northrop, Comparative Philosophy and Science in the Light of Comparative Law, in PHILOSOPHY AND CULTURE EAST AND WEST (C. Moore ed. 1962).

and fear of rebellion. In Western culture, these fears and anxieties are reciprocal--child fears parent (usually father) and parent fears child. In mythology, these fears are almost always couched in terms of violence--physical coercion and violent death. Greek mythology, the source of many archetypes fundamental to Western culture, is replete with patricide and infanticide. Cronus (one of the Titans and the father of Zeus) eats his children so that they will not supersede him; Zeus escapes this fate, in turn poisoning Cronus and taking his place. Oedipus kills his father and succeeds him as king.

Given that early Western mythology and literature portrayed parent-child relationships in terms of bloody conflict, it is hardly surprising that Freud drew on such myths to describe the anxieties plaguing modern man--anxieties centering around the parent-child relationship. And whether or not one endorses Freud's theories, their impact on the course of modern thought cannot be denied.

Western culture from its earliest Greek sources abounds with children who fear repression by parents and parents who fear rebellion by children. These cultural anxieties are even expressed in the language we use to describe our own American history. The colonies rebelled against "the mother country" and became "the fledgling republic" because of repression by England. Note that, as in Greek mythology, the repression and the rebellion were violent.

In reaction to the "violent 60s," many adults are now calling for a return to the "good ole days" when children respected their parents (and others in authority) and were obedient and well disciplined--in other words, a return to what Northrop calls the law of status. Corporal punishment, as the most obvious expression of the ascendancy of parent over

child, teacher over student, is an important symbol of law-of-status authority and, therefore, is an important element of the desire for return to the "good ole days."

Despite the progress and reform of childrearing practices during the last century, the basic relationship between parent and child remains the same, at least at a very primitive level of our collective unconscious (to borrow from Jung). Perhaps we are so loath to give up corporal punishment for children (though not for adults) partly because physical coercion is the most immediate and explicit expression of a very important authority relationship--parent and child. Control of children through corporal punishment symbolizes not only other more subtle forms of adult control of children, but also represents the absolute nature of the biologically determined relationship between parent and child--a vertical relationship in which one party (parent) rules autocratically and absolutely over the other (child).

We should remember, however, that our cultural heritage also contains the concept of what Northrop calls "liberal contractual democracy," a concept "which depends on consent rather than biology and breeding" for authority. This tradition has helped to shape all aspects of American life, including the parent-child relationship in the home and the teacher-student relationship in the school. It offers a counterpoint to primitive law of status and prescribes a relationship of basic equality between the governors and the governed--between parent and child, teacher and student. Physical coercion is obviously an inappropriate symbol of democratic law of contract.

The Supreme Court's decision in Ingraham suggests some of the tensions between these two strains of American thought and actually

perpetuates, rather than resolves, these tensions. Indeed, the majority and minority opinions indicate that the Court itself, as part of the cultural milieu, reflects the biases and tensions that have long plagued (and will probably continue to plague) Western thought in general and American thought in particular.

The Court's decision upholding the use of corporal punishment in our public schools will not exorcise from our society the moral and spiritual confusion, business and governmental corruption, or violence and lawlessness on our city streets and in our national parks and public schools, phenomena that unfortunately many of us have come to regard as symbolic of life in contemporary American society. Nor will the Court's decision likely even restore conservative values of respect for authority, love of learning, and fear of God.

But perhaps the character and vitality of contemporary American society lies in the continual balancing of extremes of authoritarianism and humanism, control and freedom, violence and love. If such be the case, then the Court's decision, coming as it does after the youth-oriented, revolutionary spirit of the sixties, is but one manifestation of our societal balancing act, which some suggest is beginning to bring about America's return to the relative tranquillity of the fifties. Indeed, according to some artists and critics, we may already have returned. "The amazing thing is," said Andy Warhol in a recent interview in U.S. News & World Report, "that we seem to have turned back the clock in this country. When I go out and stand on a street corner, everything and everybody looks just like they did in 1959. It's like 18 years just disappeared."[83]

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[83]83 U.S. NEWS & WORLD REPORT, June 27, 1977, at 57.

Alan M. Kriegsman, movie critic for The Washington Post, feels much the same way: "Its hard to escape the feeling of facing backwards these days. Seeing 'Star Wars' and 'Annie Hall' recently . . . left me with the oddest sensation of chronological vertigo."[84]

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[84]The Washington Post, June 19, 1977.